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Supreme Court, U.S.
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Case No.

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD A. CULBERTSON,
Petitioner,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Social Security Act give the Commissioner of Social Security the authority to reduce attorney fees on a discretionary, arbitrary, case by case basis without any risk of judicial review?

Do the federal courts have jurisdiction to determine whether the Commissioner of Social Security is not complying with her own regulations and enter appropriate injunctive relief?

Does the opinion entered by the Eleventh Circuit Court of Appeals in this case conflict with the opinion of the Sixth Circuit Court of Appeals entered in Buchanan v. Apfel, 249 F.3d 485 (6th Cir. 2001)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The District Court's Order granting Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is not published. (Appendix B). The Eleventh Circuit Court of Appeals Decision affirming the District Court Order is also unpublished. (Appendix A).

STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals entered its Opinion and Order on August 31, 2004. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 406(a)(4) provides in pertinent part: "...if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Commissioner of Social Security shall ... certify for payment out of such past-due benefits ... to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits ...."

42 U.S.C. § 406(a)(1) at **sentence six** [1]: "The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this title, and any agreement in violation of such rules and regulations shall be void."

42 U.S.C. § 406(a)(1) **at sentence seven**: "Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this title, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with

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[1]After this case was argued, Congress added two additional sentences to 42 U.S.C. § 406(a)(1). Although the two sentences involved in this case have not been changed, their numbers have. What was referred to as **sentence 4** in the Eleventh Circuit is now **sentence 6**. What was referred to as **sentence 5** is now **sentence 7**.

such claim."

42 U.S.C. § 406(a)(5) provides in pertinent part: "Any person who shall...make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Commissioner of Social Security shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both." 42 U.S.C. § 406(a)(5)

STATEMENT OF THE CASE

Mr. Culbertson is an attorney who represents claimants in administrative appeals of legal claims for Social Security Disability benefits. Mr. Culbertson was retained by three claimants to represent them in their claims for benefits under the Social Security Act. The claim of each of these clients had been denied by the Commissioner at the time Mr. Culbertson was retained. Each client signed a fee agreement with Mr. Culbertson agreeing that there would be no fee if their claims did not result in payment of past-due benefits, and that Mr. Culbertson would be entitled to a fee of 25 percent of any past due benefits if their claims were approved. Each claim resulted in an award of past-due benefits.

In each claim, Mr. Culbertson filed a Petition for Attorney fees requesting certification and payment by the Commissioner of attorney fees in an amount equal to 25 percent of the past due benefits due each claimant. Each client signed the Petition requesting the release of the amounts which the Commissioner had withheld from their past due benefits for attorney fees. In each claim, the Commissioner refused to

certify payment of attorney fees in an amount equal to 25 percent of the past due benefits due each claimant as required by 42 U.S.C. § 406(a)(4). Instead, the Commissioner arbitrarily reduced the fees to 13.3% of the past due benefits in one case, 10.9% of the past due benefits in another, and 7.3% of the past due benefits in the third case. The only reason given by the Commissioner for her reduction of the agreed fees was that the case was not complex enough. After the original complaint was filed, the Commissioner, again arbitrarily, increased the fee in the latter case from 7.3% to 10.9% of the past due benefits.

On August 30, 2002, Appellant filed a Complaint in the United States District Court for the middle District of Florida seeking a writ of mandamus compelling the Commissioner of Social Security to certify payment of attorney fees equal to 25% of past-due benefits awarded unless and until she promulgates, by rule and regulation, a uniform maximum fee, and compelling the Commissioner to comply with her own regulations which include standards for reviewing fee petitions. On July 7, 2003, Magistrate Judge Karla R. Spaulding filed a Report and Recommendation recommending that the Complaint be dismissed with leave for Mr. Culbertson to file an amended complaint within twenty days. (Appendix C). This Report and Recommendation was approved and adopted by Judge Gregory A. Presnell on July 25, 2003. Mr. Culbertson filed an Amended Complaint on that very same day. (Appendix D). This Complaint alleged that the Commissioner was applying arbitrary standards to reduce attorney fees, that she did not have the authority to do so, and that she was not complying with her own regulations. (Appendix D). Mr. Culbertson again sought a writ of mandamus compelling the Commissioner to comply with the Social Security Act and her own regulations. (Appendix D). On September 19, 2003, Judge Presnell entered

an Order dismissing Mr. Culbertson's Amended Complaint with prejudice. (Appendix B).

On November 12, 2003, Mr. Culbertson filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. In a Decision dated August 31, 2004, the Eleventh Circuit Court of Appeals affirmed the Decision of the District Court. (Appendix A). This Petition for Writ of Certiorari timely followed.

REASONS FOR GRANTING THE WRIT

ARGUMENT I

I. This case involves an important question of law: Does the Social Security Act give the Commissioner of Social Security the authority to reduce attorney fees on a discretionary, arbitrary, case by case basis without any risk of judicial review?

Does the Commissioner of Social Security have the authority to reduce attorney fees on a discretionary, arbitrary, case by case basis?

This question is important to attorneys who cannot determine what fee can be included in a retainer agreement and risk criminal prosecution if the fee agreed to is more than an unknown fee which will be established on an arbitrary and discretionary basis by an unknown employee of the Commissioner after the case is completed. It is important to attorneys who want to zealously represent clients without suffering financial hardship bestowed upon them by the defendant in those cases.

It is important to disabled people who have been wrongfully

denied disability benefits by the Commissioner and want to hire attorneys. It is especially important to disabled people who need their disability and health benefits the most, and want to hire the best attorneys.

It is important to the Commissioner. It is clear that the Commissioner could establish uniform maximum fees at any time. The issue is whether she has the power to reduce attorney fees on a discretionary, case by case basis. The fact that she has not established fair, uniform, maximum fees tells us that the right to establish individual fees on a case by case basis is important to her. Although this is difficult to understand due to the appearance of impropriety, and the tremendous expense that must be involved in providing the personnel to make these determinations, her desire to take on these negative factors indicate the importance of exercising this power over attorneys who bring cases before her and against her.

In spite of its importance, the Eleventh Circuit Court of Appeals did not determine whether the Commissioner must establish a reasonable fee on a uniform basis or whether she could reduce fees on a case by case basis. The Court below held "Determination of a reasonable fee is an act committed to the discretion of the Commissioner..," and therefor, mandamus jurisdiction is unavailable. (Appendix A). That does not answer the question which was raised: Does the Social Security Act require the Commissioner of Social Security to establish a uniform maximum or does she have the power to reduce attorney fees on a discretionary, arbitrary, case by case basis?

This case began when three disabled people came to Mr. Culbertson. They could not work. Each of the claimants had tried to obtain their disability benefits by themselves, but

were denied. Each claimant asked Mr. Culbertson to represent them. Each claimant entered into a contract with Mr. Culbertson. Florida law provides for the right to contract. "To both the citizen and his government the right to contract is the most valuable right known to the law. The Constitution guarantees its inviolability." State ex rel. Dos Amigos, Inc., v. Lehman, et al., 100 Fla 1313, 1315 (Fla. 1930).

There is no question that Mr. Culbertson complied with his end of the bargain providing competent and effective legal representation. The Commissioner eventually agreed that all three of his clients were in fact disabled and paid them retroactive and ongoing benefits.

The problem arose when the Commissioner refused to recognize the contracts which provided for a contingency fee payable to Mr. Culbertson in the amount of 25% of the past due benefits. Instead, the Commissioner told Mr. Culbertson he could not charge, and the clients could not pay, more than 7.3% in one case, 10.9% in another, and 13.3% in the third. The blanket reason given in the boilerplate notices was that the case was not complex enough. Mr. Culbertson questioned the Commissioner's authority to take this arbitrary action at the administrative level, in the United States District Court for the Middle District of Florida, and in the Eleventh Circuit Court of Appeals.

No other defendant claims the power to interfere with valid contracts between Mr. Culbertson and reduce the fees he has earned - no corporation, no individual, no other administrative official. Of course, Mr. Culbertson is an officer of the court, and he is subject to the ethical obligation not to charge an unreasonable fee which is enforced by the State Bar,

but no defendant ever claimed the right to arbitrarily reduce a valid reasonable fee. What gives the Commissioner such a power?

The only authorization given to the Commissioner[2] is the option to "prescribe the **maximum fees** which may be charged for services performed in connection with any claim before the Commissioner of Social Security..." (Emphasis added) 42 U.S.C. § 406(a)(1) **at sentence six**.[3]

This section does not authorize a case by case determination, but instead requires that the maximum fee be established "by rule or regulation." 42 U.S. C. § 406(a)(1) **at sentence six**. The Magistrate's Report and Recommendation which was adopted by the District Court and is the subject of this appeal specifically found:

> The SSA has not promulgated a rule or regulation setting a maximum fee. See SSA Hearings, Appeals Litigation Law Manual ("Hallex"), Chapter I-1-200, 1993 WLL 643249 (June 30, 1994) ("The regulations do not specify maximum fees; rather,

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[2]42 U.S.C. § 406(a)(2), which is not involved in this case, requires the Commissioner to approve a fee which may be agreed to in advance. One of the new sentences added to 42 U.S.C. § 406(a)(1) after this case was filed in the Eleventh Circuit provides for reimbursement to claimants if the representative charges more than the amount authorized.

[3]Throughout this Petition, the Petitioner will be referring to **sentence six** and **sentence seven** of § 406(a)(1).

> they prescribe criteria for evaluating fee petitions and determining reasonable fees for representatives."). (Appendix C)

There is no question that the Commissioner has not by rule or regulation prescribed any **maximum fee**. The Commissioner's regulations contain no **maximum** contingency fee. There is no **maximum** hourly fee. There is no **maximum** flat fee.

The Commissioner has taken the position that she has complete discretionary control over attorney fees regardless of the statutory requirements set forth above, and regardless of any contract entered into by the parties which would otherwise be enforceable under State law. The Commissioner's regulations provide: "We decide the amount of the fee, if any, a representative may charge or receive." 20 CFR § 404.1725(b)(2). This is an extremely broad power which the Commissioner claims to have. This is a power which could easily be abused, especially when the Commissioner's interests are adverse to the people the attorneys represent.

One would think that if such a power was meant to be given it would be clearly and unequivocally bestowed. There is no credible evidence that such a power was ever meant to be given to the Commissioner. In fact, the Commissioner claims three words in **sentence seven** of 42 U.S.C. § 406(a)(1) as the sole source of this broad power. These words are "a reasonable fee." The problem with the Commissioner's claim is the other 72 words in **sentence seven** of 42 U.S.C. § 406(a)(1) and the 83 words in 42 U.S.C. § 406(a)(4). As it will be pointed out in detail below, **sentence seven** of 42 U.S.C. § 406(a)(1) does not bestow such authority upon the Commissioner, nor is there any authority anywhere, for that

matter, for such a proposition.

The first group of words in **sentence seven** of 42 U.S.C. § 406(a)(1) which limits the Commissioner's power is: "...whenever the Commissioner of Social Security... makes a determination favorable to the claimant..." Clearly, **sentence seven** only applies when the Commissioner makes a decision favorable to the claimant. If **sentence seven** is the source of the Commissioner's power to control fees, then she has no power in any case where she denies the claim. If Mr. Culbertson had charged his clients a flat fee of $1,000.00 and he lost the case, **sentence seven** does not give the Commissioner any authority to interfere.

The next group of words which show that **sentence seven** does not give the Commissioner the power she claims is: "...if the claimant was represented by an attorney in connection with such claim..." **Sentence seven** does not apply when the claimant is represented by a non-attorney which is authorized by 42 U.S.C. § 406(a)(1). If **sentence seven** is the source of the Commissioner's power to control fees, then she has no power to control fees of non-attorneys.

One must ask oneself, why would Congress deprive the Commissioner of any power over the fees charged by unregulated paralegals who may lose all of their cases, and mandate that the Commissioner "fix" the fee whenever there is a favorable claim and the claimant is represented by an attorney?

That's where the 83 words in 42 U.S.C. § 406(a)(4) come in. This section applies only when "the claimant is determined to be entitled to past due benefits", and only when

"the person representing the claimant is an attorney..." Section 406(a)(4) provides that in such cases the Commissioner "... shall ... certify for payment out of such past-due benefits ... to such attorney an amount equal to so much of the **maximum fee** as does not exceed 25 percent of such past-due benefits ..." (Emphasis added)

The Commissioner has an obligation to pay prevailing attorneys such as Mr. Culbertson so much of the **maximum fee** as does not exceed 25 percent of the claimant's past-due benefits. If the Commissioner had established maximum fees, she would have to "fix" which one would be reasonable to the attorney. For example, if she had established a maximum hourly fee of $200.00 and a maximum flat fee of $4,000.00, and Mr. Culbertson had agreed to a flat fee of $4,000.00, then it would be reasonable to fix the flat fee within the maximum established. The sole reason for the existence of **sentence seven** is to fix the attorney fee in accordance with the **maximum fees** prescribed by rule or regulation pursuant to sentence six of 406(a)(1). It clearly was not intended to give the Commissioner the broad power to determine every fee in every case. Since the Commissioner has decided not to establish a maximum fee, the fee charged must be approved as long as it "does not exceed 25 percent of such past-due benefits". (emphasis added) 42 U.S.C. § 406(a)(4)

Prior to 1967, attorneys did not have the right to payment of fees out of the past due benefits of claimants. Sentence six of 406(a) gave the Commissioner her authority to establish maximum fees by rule and regulation, but all representatives, attorney and non-attorney, had to collect their fees directly from their clients. In 1967, Congress gave attorneys in successful cases the right to collect their fees

directly from the past due benefits of their clients. This was done by adding the following provision which includes the current sentence seven.:

> Whenever the Secretary, in any claim before him for benefits under this title, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this title, the secretary shall, notwithstanding section 205(I), certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or © the amount agreed upon between the claimant and such attorney as the fee for such attorney's services. U.S. Code Congressional and Administrative News, 90th Congress, 1st Session, Volume 1 1967, pages 993 and 994.

By enacting this provision, Congress gave successful attorneys the right to collect their fees from the past due benefits of their clients. The only limits were the amount agreed to by the parties, the maximum fee, if any, and 25% of the total past due benefits. To implement this right, Congress mandated the Commissioner to "fix" the fee within these limits and to be "reasonable."

Sentence seven is not an only child enacted to give the

Commissioner the broad powers she claims. It was born at the same time as Mr. Culbertson's right to payment out of past-due benefits, and it was bred for the purpose of fixing the fee within the three options set by Congress. One of those options was the maximum fee prescribed by rule and regulation, if any.

Eleven more words which show the Commissioner does not have the power she claims are found in sentence seven which provides that any fee fixed by the Commissioner has to be "in accordance with the regulations prescribed pursuant to the preceding sentence." The preceding sentence, **sentence six,** provides that the Commissioner "may" by rule and regulation prescribe the maximum fees. Since the Commissioner has chosen not to promulgate a maximum fee by rule and regulation, then sentence seven has no use. How can the Commissioner fix any fee in accordance with regulations that do not exist? It may serve some purpose in the future if the Commissioner should choose to establish a maximum fee by rule and regulation. Unless and until that happens, by its own terms, **sentence six** serves no purpose.

Congress clarified Mr. Culbertson's right to payment out of his clients' past-due benefits in 1990. At that time, Congress created a special section setting forth his right to payment. U.S. Code congressional and Administrative News, 101st Congress, Second Session, 104 Stat. 1388-266 to 268. 42 U.S.C. § 406(a)(4) provided:

> Subject to subparagraph (d), if the claimant is determined to be entitled to past-due benefits under this title and the person representing the claimant is an attorney, the Commissioner shall, notwithstanding section 205(I), certify for payment out of such past-due benefits (as determined before any applicable reduction

> under section 1127(a) to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits [as determined before any applicable reduction under section 1127(a)].

The authorization to reduce the fee to the amount "fixed" by the Commissioner which was in the previous provision, was specifically removed from 406(a)(4). Since subsection (B) does not apply (this is not a fee agreement case), 406(a)(4) mandates that the Commissioner "shall" certify for payment out of the past-due benefits an amount which does not exceed any maximum fee, if any, established by the Commissioner or 25 percent. Since the Commissioner has not prescribed, by rule and regulation, any maximum fee, she is required to certify for payment an amount equal to 25 percent of the past-due benefits. Section 406(a)(4) gives Mr. Culbertson a clear right to this payment.

When mandating certification of payment to attorney's out of past-due benefits, Congress recognized three possible bases for reduction of the fee. These include subsection (d) which is an assessment on the fees paid to attorneys similar to a user fee; the Supplemental Security Offset which could apply to claimants under 42 U.S.C. § 1320a-6; and the maximum fee. 42 U.S.C. § 406(a)(4). There is no mention of any possible reduction of the attorney fee pursuant to sentence seven of Section 406(a)(1). This is a further indication that Congress did not intend to authorize a discretionary reduction only when an attorney is involved.

Section 406(a)(4) does not use the word "reasonable." Sentence seven of 406(a)(1) does not even come into play because there are no regulations prescribed pursuant to

sentence six to fix a fee "in accordance with."

This issue is not one of semantics. A uniform maximum fee is important for two reasons. First, the entire statutory scheme for paying attorneys out of past-due benefits relies on a maximum fee. 42 U.S.C. Section 406(a)(4) requires the Commissioner to certify for payment out of the past-due benefits of a claimant an amount equal to so much of **the maximum fee** as does not exceed 25% of such past-due benefits when the claimant is represented by an attorney. 42 U.S.C. Section 406(a)(5) provides that any person who shall "knowingly charge or collect directly or indirectly any fee in excess of **the maximum fee**, or make any agreement directly or indirectly to charge or collect any fee in excess of **the maximum fee**, prescribed by the Commissioner of Social Security shall be deemed guilty of a misdemeanor and upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both." (Emphasis added) The entire statutory scheme regarding attorney fees revolves around "the maximum fee" established "by rule and regulation." In this case alone, the Commissioner has unilaterally imposed four maximum contingent fees (i.e. 7.3%, 9.5%, 10.9%, and 13.3%), but, of great importance, none of these maximum fees were established by rule or regulation.

If the Commissioner does have the authority to establish case by case fees after the case is over, then any attorney who agreed to charge a fee in excess of that previously unknown limit is guilty of a misdemeanor. "Any person who shall...make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Commissioner shall be deemed guilty of a misdemeanor..." 42

U.S.C. § 406(a)(5). It would appear that the Commissioner's actions in this case would have made Mr. Culbertson guilty of 3 misdemeanors. He entered into contingency fee agreements for the maximum allowed by the Social Security Act (25%), but did not limit the agreed fees to less than the arbitrary maximum fees set later by the Commissioner - 7.3% in one case, 9.5% in another case, or 13.3% in the third case. It is unlikely that Congress expected attorneys to be clairvoyant. It is more likely that Congress expected the Commissioner to comply with the requirement that a uniform maximum fee be established pursuant to rule or regulation so that everyone will know what that maximum is when they enter into fee agreements. Congress anticipated inaction by the Commissioner by providing its own contingency fee limit of 25% which is the amount agreed to by Mr. Culbertson and his clients.

The second reason why a uniform maximum fee is important is to protect attorneys who represent claimants before the Commissioner, and thereby enable claimant's to obtain quality representation. The requirement that the Commissioner be reasonable was not intended to override the rest of the statutory scheme. It was not intended to give the Commissioner discretion to arbitrarily reduce attorney fees. The Congressional mandate that the Commissioner be reasonable when she fixes the appropriate uniform maximum does not give her the right to be unreasonable and disregard the law and her own regulations without any possible judicial review. Ironically, the requirement that the maximum fee be reasonable was actually intended as a protection to attorneys.

If Congressional intent is to be carried out, claimants need attorneys. If attorneys are expected to zealously represent claimants challenging wrongful denials of Social Security

claims, administratively and in court, they need protection from the defendant in those actions. Congress attempted to provide that protection by requiring the Commissioner to establish one and only one maximum fee that would apply to all representatives. This would prevent the Commissioner from singling out effective attorneys, and reducing their fees on an arbitrary basis. Congress required the Commissioner to be reasonable when fixing the fee payable to attorneys by specifically referring to the regulations prescribing the maximum fee under sentence six of 42 U.S.C. Section 406(a)(1). In addition, Congress used the word "fix" instead of a word that would give discretion such as "determine."

One may wonder how the Commissioner could be unreasonable when the maximum fee is established by rule or regulation. Comparing this case to Buchanan v. Apfel, 249 F.3d 485 (6th Cir. 2001) illustrates the Commissioner's capacity to find a way. In this case, Mr. Culbertson agreed to a contingency fee of 25% of past due benefits. The Commissioner would not fix and certify payment at the rate of 25%, but instead reduced his fees to flat rates. Mr. Buchanan agreed to represent his clients on a flat fee basis. The Commissioner would not recognize the flat rate agreed to by the parties, but instead used the 25% rate to reduce the fees earned by Mr. Buchanan. Congress was wise to require the Commissioner to be reasonable when fixing the appropriate maximum fee.

What was intended as a shield given by Congress to protect attorneys from unreasonable actions by the Commissioner is being used as a sword to slash fees that claimants want to pay for representation, and which have been earned by the attorneys under contracts which are valid and

enforceable under State law.

The Eleventh Circuit Court of Appeals incorrectly determined:

> Determination of a reasonable fee is an act committed to the discretion of the Commissioner; "[w]here judgment or discretion is reposed in an administrative agency and has by that agency been exercised, courts are powerless by the use of the writ [of mandamus] to compel a different conclusion." United States ex rel. Chicago Great Western R. Co. V. ICC, 55 S.Ct. 326, 330 (1935). (Appendix A).

This holding begs the question. Judgment or discretion has not been reposed in Social Security to arbitrarily reduce attorney fees on a case by case basis. The only discretion granted the Commissioner is to establish a uniform maximum fee by rule or regulation that applies to everyone. The Commissioner has decided not to exercise that option. Therefor, under the terms of 42 U.S.C. § 406(a)(4) she is required to certify payment to Mr. Culbertson an amount equal to 25% of the past due benefits payable to his clients. The Commissioner does not have any discretion to arbitrarily reduce that payment.

The issue is not whether the fees charged by Mr. Culbertson are reasonable. If any of Mr. Culbertson's clients feel he is charging an unreasonable fee, they already have remedies. They can report him to the Florida Bar who will enforce the ethical rule against charging unreasonable fees. The claimants can also seek relief in State Court under the contract laws of Florida. Mr. Culbertson's clients feel that the fee he is seeking is reasonable. Each client submitted a written statement to the Commissioner stating that they agree with the

fee Mr. Culbertson is seeking to collect.

Mr. Culbertson is not asking the Commissioner to "award" a fee. He is asking the Commissioner to release his clients' money which they have authorized to pay his fee. Mr. Culbertson is not asking the court to rule on whether the Commissioner's determination is reasonable. Mr. Culbertson is only asking the court to order the Commissioner to comply with 406(a)(4).

It is the Commissioner who is claiming an extraordinary power which she does not have. The answer to the question is "No". The Commissioner of Social Security does not have the power to reduce attorney fees on a discretionary, arbitrary, case by case basis.

42 U.S.C. § 406(a)(4) provides that she has a clear duty to certify payment to Mr. Culbertson out of the past due benefits payable to his clients the fee authorized by Congress and his clients - 25%. Mr. Culbertson has a clear right to the relief requested, and no other remedy is available. Mr. Culbertson has exhausted all administrative remedies available to him.

Under these circumstances, United States ex rel. Chicago Great Western R. Co. V. ICC does not apply. The courts below do have mandamus jurisdiction.

It is important to note that the issue in this case is not the same as the one decided in Gisbrecht v. Barnhart, 122 S.Ct. 1817, 535 U.S. 789 (2002). Of course, the courts have inherent power to independently assure that reasonable results are yielded in particular cases. However, the Commissioner is not an impartial Article III tribunal. Mr. Culbertson is an officer of

the court. He is not an officer of the Commissioner. The Commissioner has only the power given to her by Congress, which does not include the power to determine how much each individual claimant may pay his or her attorney.

ARGUMENT II

II. The Decision of the Eleventh Circuit Court of Appeals in this case conflicts with the decisions of this Court and the Sixth Circuit Court of Appeals decision in Buchanan v. Apfel, 249 F.3d 485 (6th Cir. 2001).

In Buchanan v. Apfel, 249 F.3d 485, 492 (6th Cir. 2001), the Sixth Circuit specifically held:

> So despite our lack of jurisdiction to pass on the reasonableness of any fee awarded to Buchanan at the administrative level, see McCarthy v. Sec'y of Health & Human Servs., 793 F.2d 741, 742-743 (6th Cir. 1986), we do have jurisdiction to consider whether the Commissioner has failed to comply with his own regulations. We accordingly hold that mandamus jurisdiction is available for Buchanan's claim.

Like Buchanan, Mr. Culbertson's First Amended Complaint alleged:

> The system of reviewing each individual claim for attorney fees is based on the application of arbitrary standards by Defendant who has a conflict of interest.
>
> The decisions were unlawful because they denied Plaintiff due process guaranteed by the Fifth Amendment of the Constitution and violated the requirements of 42 U.S.C. §

406(a)(4)(A), 42 U.S.C. § 406(a)(1), 20 CFR. § 404.1720, 20 CFR § 404.1725 and the provisions of the agreed order entered into by the Defendant to settle the case of Buchanan v. Apfel, 69 F.Supp.2d 996 (E.D. Tenn. 1999).
When considering the Plaintiff's fee requests, the decision-makers failed to properly consider the factors required by the regulations found at 20 CFR 404.1725.
When considering the Plaintiff's fee requests, the decision-makers failed to properly state what weight was given to the factors required by the regulations found at 20 CFR 404.1725 when considering Mr. Culbertson's fee requests. (Appendix D).

The Commissioner is required by basic due process to follow her own regulations. The same basic allegations involved in this case were the basis of the Buchanan case. In that case, it was alleged that the Commissioner was not following her own regulations (the same two involved in this case), and she violated due process when she deprived Mr. Buchanan of the fee he had earned which was agreed to by his clients.

The Commissioner's own regulations require her to consider certain factors. See 20 CFR Section 404.1725. In Buchanan, the Commissioner agreed to consider the factors contained in Section 404.1725 and "state in the fee authorization notice how the fee decision was made." Mr. Buchanan and Mr. Culbertson both alleged that the Commissioner did not consider the factors contained in Section 404.1725 when she deprived them of the fees to which they were entitled under State and federal law. They both alleged that the Commissioner did not state in the fee authorization notice how the fee decision was made. Mr. Culbertson also alleged that the Commissioner is applying arbitrary standards.

The Sixth Circuit found that mandamus jurisdiction exists, at least to the extent that it is necessary to require the Commissioner to abide by the laws and regulations governing the Social Security Administration. In this case, the Eleventh Circuit found mandamus jurisdiction does not exist because "At bottom, Culbertson's challenge is to the amount of the fee he was awarded, a decision that is committed to the Commissioner's discretion and not subject to judicial review. (Appendix A).

Even if the Commissioner has authority to deprive attorneys of fees, which they are entitled to under State law, she is not free to use arbitrary standards to do so. She is not free to disregard her own regulations. She cannot refuse to certify attorney fees solely because an attorney has brown eyes. She cannot reduce an attorney fee from $10,000.00 to ten cents solely because the claimant's attorney filed ten federal cases against her the previous year. The holding by the Eleventh Circuit Court of Appeals that federal courts would have no jurisdiction in such cases because the amount of the fees may ultimately be affected is wrong.

The issue is not the amount of the fee. The issue is whether or not the Commissioner complied with her own regulations. The Eleventh Circuit holding that the federal courts do not have subject matter jurisdiction in a case such as this conflicts with the holding by the sixth circuit to the contrary and prior precedent of this court.

This Court has consistently held there is a "well settled presumption favoring interpretations of statutes that allow judicial review of administrative action." Reno v. Catholic Social Services, Inc., 509 U.S. 43, 63-64, 113 S.Ct. 2485, 2499

(1993), quoting from McNary V. Haitian Refugee Center, Inc., 498 U.S. 479, 496, 111 S.Ct. 888, 898 (1991). The Supreme Court will find the intent to preclude judicial review "only if presented with 'clear and convincing evidence.'" Reno, 509 U.S. at 64, 113 S.Ct. at 2499, quoting from Abbot Laboratories v. Gardner, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511 (1967).

This presumption has a long history. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." Marbury v. Madison, 1 Cranch 137, 5 U.S. 137 (1803, Chief Justice Marshall), as cited in Bowan v. Michigan Academy of Family Physicians, 476 U.S. 667, 670, 106 S.Ct. 2133, 2136 (1986). Chief Justice Marshall later stated:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process...leaving to the debtor no remedy, no appeal to the laws of this country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States. United States v. Nourse, 9 Pet. 8, 28-29, 34 U.S. 8, 28-29 (1835).

The Commissioner of Social Security does not have the right to ignore the provisions of the Social Security Act or her own regulations with impunity. The United States District Court for the Middle District of Florida has mandamus jurisdiction when it is alleged that the Commissioner has done

so - even if the ultimate result of court ordered compliance might be a change in an attorney fee. The decision of the Eleventh Circuit Court of Appeals to the contrary conflicts with the prior opinions of this court as well as the decision of the Sixth Circuit Court of Appeals in Buchanan v. Apfel, 249 F.3d 485, 492 (6th Cir. 2001).

Neither of the Sixth or Eleventh Circuit decisions held that 42 U.S.C § 405(h) deprives the federal courts of mandamus jurisdiction under 28 U.S.C. § 1361. 42 U.S.C. § 405(h) states that no action may be brought under 28 U.S.C. § 1331 or 28 U.S.C. § 1346. This section does not prohibit mandamus jurisdiction under 28 U.S.C. § 1361. 42 U.S.C. § 405(g) provides for judicial review of decisions of the Commissioner after a hearing. 42 U.S.C. § 405(h) provides that the findings and decisions of the Commissioner "after a hearing" shall be binding on the parties and that neither the findings of fact or the decision of the Commissioner are otherwise subject to review. The Commissioner has determined that she has the right to unilaterally reduce attorney fees at her discretion, and attorneys do not have the right to a hearing. Since there were no hearings in this case, neither 42 U.S.C. § 405(g) nor 42 U.S.C. § 405(h) apply. They neither give nor deprive the courts of jurisdiction. 28 U.S.C. § 1361 is the basis of the district court's jurisdiction to issue a writ of mandamus.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 31, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-15819
Non-Argument Calendar

D. C. Docket No. 02-01015-CV-ORL-31-KRS

RICHARD A. CULBERTSON,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(August 31, 2004)

Before EDMONDSON, Chief Judge, TJOFLAT and MARCUS, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Richard A. Culbertson filed a complaint seeking judicial review of attorneys fee awards

made by Defendant-Appellee, the Commissioner of Social Security. Culbertson sought a writ of mandamus and a declaratory judgment ordering the Commissioner to certify for payment as attorneys fees an amount equal to 25% of the past due benefits awarded by the Commissioner to three of Culbertson's clients: a percentage amount to which these clients had agreed by contract.

Culbertson asserts district court jurisdiction under the Mandamus Act, 28 U.S.C. § 1361; the Federal Declaratory Judgment Act, 28 U.S.C. § 2201; and the Administrative Procedure Act, 5 U.S.C. § 704. The district court dismissed for want of subject matter jurisdiction but granted Culbertson leave to file an amended complaint: In his amended complaint, Culbertson alleged no new grounds for federal jurisdiction; the district court followed its earlier decision. No reversible error has been shown; we affirm.

Section 406(a)(1) empowers the Commissioner to fix attorneys fees for services performed in social-security cases resolved at the administrative level. 42 U.S.C. § 406(a)(1). The Commissioner is empowered to issue rules and regulations prescribing maximum fees that may be charged; and whenever a benefits claimant who was represented by an attorney is successful in his claim, section 406(a)(1) obligates the Commissioner to fix, in accordance with such rules and regulations, "a reasonable fee" to compensate for legal services performed.[1] The Commissioner has established

1. We describe here the "fee petition" process. An attorney may instead proceed under the "fee agreement" provisions of 42 U.S.C. § 401(a)(2) which requires the filing of the fee agreement with the (Cont'd)

no global maximum fees by regulation. Culbertson argues that the Commissioner is empowered only to set a uniform maximum fee. Because the Commissioner has established no uniform maximum fee, Culbertson argues that the Commissioner was without power to reduce the fee agreed upon by his clients. Culbertson contends that mandamus jurisdiction is available to compel the Commissioner to perform a duty owed to him: certification of an attorneys fee award equal to 25% of the past due benefit awarded in each case.

The Commissioner counters that 42 U.S.C. § 406(a)(1) entitles an attorney performing services on the administrative level only to a "reasonable fee;" the reasonableness of a fee award rests exclusively within the Commissioner's discretion. The Commissioner has prescribed rules and regulations for determining a "reasonable-fee." *See* 20 C.F.R. § 404.1725. The Commissioner says that the reasonable fee established by the Commissioner under the regulations in each case is the maximum fee that may be collected.

This circuit has not decided whether mandamus jurisdiction is available in cases arising under the Social Security Act or is barred by the limitation on judicial review contained in 42 U.S.C. § 405(h). We have assumed — but have not decided — that mandamus jurisdiction may be available in an appropriate case. *See Lifestar Ambulance Services Inc. v. United States*, 365 F.3d 1293,1295 n. 3

(Cont'd)

Commissioner before the Commissioner renders decision on the claim. Culbertson chose the fee petition process for his compensation in each of these three clients' cases.

(11th Cir. 2004). Again assuming *arguendo* the availability of mandamus jurisdiction in an appropriate case, we agree with the report and recommendation adopted by the district court that mandamus jurisdiction is unavailable in the instant case to review the reasonableness of a fee award. Determination of a reasonable fee is an act committed to the discretion of the Commissioner; "[w]here judgment or discretion is reposed in an administrative agency and has by that agency been exercised, courts are powerless by the use of the writ [of mandamus] to compel a different conclusion." *United States ex rel. Chicago Great Western R. Co. v. ICC*, 55 S.Ct. 326, 330 (1935).

Culbertson sought review also under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Administrative Procedure Act, 5 U.S.C. § 704. The district court committed no error when it dismissed claims predicated on jurisdiction under these statutes: neither the Declaratory Judgment Act nor the Administrative Procedure Act provide an independent source of subject matter jurisdiction: *See Red Lobster Inns, Inc. v. New England Oyster House, Inc.*, 524 F.2d 968, 969 (5th Cir.1975) (Declaratory Judgment Act independently confers no federal subject matter jurisdiction); *Califano v. Sanders*, 97 S.Ct. 980, 984 (1977) (Administrative Procedure Act confers no independent grant of subject matter jurisdiction to challenge agency acts in district court).

Culbertson argues that the district court erred when it concluded that the amended complaint alleged no new grounds for federal jurisdiction. The amended complaint added a new issue claiming the Commissioner failed "to properly consider" her own regulations and failed "to properly state" the weight given to each of the factors

the regulations prescribe for evaluating fee petitions. Culbertson charged that the Commissioner's failure to properly consider and articulate its application of the regulations rendered the fee awards unlawful and constituted a due process violation. On this issue, Culbertson asked that the court order the Commissioner to reevaluate the amount of each of the challenged fee awards; to set reasonable attorneys fees for each case in accordance with applicable laws and regulations; and to state the weight given each of the factors and regulations require be considered.

To the extent Culbertson claimed that the Commissioner failed to comply with her own regulations, the amended complaint did offer a new rationale for mandamus jurisdiction. Culbertson argues that even if the district court was without jurisdiction to review the reasonableness of the fee award, the district court had jurisdiction to review the Commissioner's compliance with her own regulations. *Buchanan v. Apfel*, 249 F.3d 485, 492 (6th Cir. 2001) ("despite our lack of jurisdiction to pass on the reasonableness of any fee awarded to Buchanan at the administrative level, . . . we do have jurisdiction to consider whether the Commissioner has failed to comply with his own regulations").[2]

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2. The court in *Buchanan* determined that the district court had mandamus jurisdiction to consider whether the Commissioner failed to apply its own regulations when it imposed a flat cap of 25 per cent of past due benefits awarded on attorneys fee awards. The cap resulted in an hourly rate allegedly as low as $5.50 per hour. Ironically, Culbertson argues before us that the Commissioner is *obligated* to certify an award of 25 percent of past due benefits. Just as the 25 percent cap in Buchanan ran afoul of the Commissioner's duty to apply the regulations, so would a blanket 25 percent award.

Even accepting that, in an appropriate case, mandamus jurisdiction is available, Culbertson presents no appropriate case. Mandamus will lie, if at all, only in the most compelling cases and only where, among other things, the defendant owes the plaintiff a clear nondiscretionary duty. *See Cash v. Barnhart*, 327 F.3d 1252, 1257-58 (11th Cir. 2003). At bottom, Culbertson's challenge is to the amount of the fee he was awarded — a decision that is committed to the Commissioner's discretion and not subject to judicial review: Culbertson seeks to cloak his challenge in terms of the Commissioner's compliance with applicable regulations, but the complaint speaks to no alleged failure to apply the regulation factors listed in 20 C.F.R. 404.1725; it speaks to an alleged failure to "properly consider" these factors. The challenge presented is to the reasonableness of the fee award.[3]

AFFIRMED.

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3. Culbertson also claims that the decision-makers failed to "property state" the weight given to each of the factors the regulations require to be considered. This claim also states no compelling case clearly showing non-performance of a nondiscretionary duty sufficient to support mandamus jurisdiction.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED SEPTEMBER 19, 2003

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:02-cv-1015-Orl-31KRS

RICHARD A. CULBERTSON,

Plaintiff,

-vs-

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER

This cause comes for the Court's consideration on Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction or in the Alternative for Summary Judgment (Doc. 16), and Plaintiffs Response thereto (Doc. 18).

On August 30, 2002, Plaintiff filed a Complaint, seeking judicial review of Defendant's attorney's fee award under the Mandamus Act, 28 U.S.C. § 1361; the federal Declaratory Judgment Act, 28 U.S.C. § 2201; and the Administrative Procedure Act, 5 U.S.C. § 704.

Appendix B

On July 7, 2003, Magistrate Judge Karla Spaulding issued a Report and Recommendation recommending a dismissal of the Complaint. Although she treated the Motion as one for summary judgment, she recommended that the Court grant leave to file an amended complaint. (Doc. 13). The Court adopted Judge Spaulding's Report and Recommendation on July 25, 2003 (Doc. 14). The same day that the Court adopted the Report and Recommendation, Plaintiff' filed an Amended Complaint (Doc. 15). The Amended Complaint again seeks judicial review pursuant to the Mandamus Act, the Declaratory Judgment Act, and the Administrative Procedures Act.

Plaintiff failed to allege any new grounds of federal jurisdiction in his Amended Complaint. Hence, due to this Court's Order of July 25, 2003, the Court is precluded from re-reviewing the Amended Complaint under the law of the case doctrine.

Even if the Court did have federal jurisdiction, it would not have the power to review the reasonableness of the fee awarded by the Commissioner. *Buchanan v. Apfel*, 249 F.3d 485, 491 (6th Cir. 2001). Indeed, absent some colorable claim that: 1) the Commissioner's actions were egregious or shocked the conscience, *id.*, or 2) the Commissioner failed to comply with her own regulations, *id.* at 492, the Court has no basis to review the Commissioner's award of attorney's fees pursuant to 42 U.S.C. § 406(a).

Appendix B

For the foregoing reasons,

it is therefore **ORDERED AND ADJUDGED** that Defendant's Motion (Doc. 16) is **GRANTED**. Plaintiff's Amended Complaint is hereby **DISMISSED WITH PREJUDICE**.

DONE and **ORDERED** in Chambers, Orlando, Florida this 19 day of September, 2003.

s/ Gregory A. Presnell
GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED JULY 7, 2003

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:02-cv-1015-Orl-31KRS

RICHARD A. CULBERTSON,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

This matter came before the Court for consideration without oral argument on the Complaint filed by the plaintiff, Richard A. Culbertson, seeking a writ of mandamus and a declaratory judgment ordering the Commissioner of the Social Security Administration ("Commissioner") to certify for payment as attorney's fees an amount equal to 25% of past-due benefits awarded by the Commissioner to three of Culbertson's clients. (Doc. No. 1).

Appendix C

The Commissioner filed a Motion to Dismiss Plaintiff's Complaint, supported by the Declaration of Dale Danner and exhibits attached thereto. (Doc. No. 4). Culbertson responded to the Commissioner's Motion, supported by the Declaration of Richard A. Culbertson and exhibits attached thereto. (Doc. No. 5). With the permission of the Court, the Commissioner replied to Culbertson's response. (Doc. No. 6).

The matter has been referred to me pursuant to Middle District of Florida Local Rule 6.01(c)(21) for issuance of a report and recommendation. I issued a *Milburn* order in which I advised the parties that the Court would take the motion under advisement on June 23, 2003. (Doc. No. 8).

Thereafter, the Commissioner filed an amended Declaration of Dale Danner. (Doc. No. 10).[1] Culbertson filed the second Affidavit of Richard A. Culbertson. (Doc. No. 12).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

Culbertson, an attorney, represented Brett Beers, Linda Fuller-Gill, and Mary Hollenbach before the Social Security Administration ("SSA") with regard to their claims for Social Security disability benefits. (Second Culbertson Aff. ¶¶ 1, 3, 4) Each of these individuals signed a fee agreement in which he or she agreed that if the SSA favorably decided the claim,

1. The amended declaration deleted the statement that it was true to the best of the affiant's information and belief, but the statutory reference to 28 U.S.C. § 1746 remains incorrect. I will treat the amended declaration as a sworn statement under section 1746.

he or she would pay Culbertson 25% of past-due benefits awarded as his attorney's fee. (*Id.* ¶ 4 & app. 1).

Beers, Fuller-Gill, and Hollenbach were each awarded past due benefits in administrative proceedings before the SSA. Although the amount of the past due benefits awarded is not in the record, Culbertson avers that 25% of the benefits awarded to Beers would be $11,022.50 (Second Culbertson Aff. ¶ 7), to Fuller-Gill would be $5,650.75 (*id.* ¶ 10), and to Hollenbach would be $13,708.62. (*id.* ¶ 16).

Each award of attorney's fees was substantially below the 25% fee requested. The ALJ who made the favorable decision on Beers's claim approved a fee of $4,200.00, stating that the reduction was because there were no significantly complex legal, medical or vocational issues involved. (Second Culbertson Aff. ¶ 9 & app. 5). The SSA recommended an attorney's fee award to Fuller-Gill of $5,650.75 (Second Culbertson Aff. ¶ 104 app. 6), but an administrative law judge ("ALJ") and Deputy Chief ALJ authorized an attorney's fee of only $3,000.00. (Second Culbertson Aff. ¶¶ 10, 11, 15 & app. 7). The ALJ who issued Hollenbach's favorable decision approved a fee of $4,000.00, but a Regional Chief ALJ increased the fee to $6,000.00. (*Id.* ¶¶ 16, 19 & app. 15).

Danner avers that the records he reviewed do not show that Culbertson appealed the fee awards for Beers or Fuller-Gill. (Second Danner Aff.¶ 1b.,c.). However, Culbertson avers that the Regional Chief ALJ reviewed the fee award for Beers. (Second Culbertson Aff. ¶ 9 & app. 5). As to the award for Fuller-Gill, Culbertson avers that the

decision by the Deputy Chief ALJ Stated that Fuller-Gill had no further appeal rights. (Second Culbertson Aff. ¶ 15 & app. 11).

II. OVERVIEW OF SSA ADMINISTRATIVE ATTORNEY'S FEE STATUTE AND REGULATIONS.

Awards' of attorney's fees for representation of claimants in administrative proceedings before the SSA is governed by 42 U.S.C. § 406(a). It provides, in pertinent part, as follows:

> The Commissioner of Social Security may, by rule and regulations, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter. . . . Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security . . . makes a determination favorable - to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

Regulations set forth seven factors the Commissioner shall consider when addressing an attorney's fee request. 20 C.F.R. §§ 404.1725, 416.1525. The SSA has not promulgated a rule or regulation setting a maximum fee. See SSA Hearings, Appeals Litigation Law Manual ("HALLEX"), Chapter

1-1-200, 1993 WL 643249 (June 30, 1994) ("The regulations do not specify maximum fees; rather, they prescribe criteria for evaluating fee petitions and determining reasonable fees for representatives.").

In 1990, section 406 was amended to provide for an expedited method for seeking an attorney's fee award. *See* 67 Fed. Reg. 2477-01, 2002 WL 58099 (Jan. 17, 2002). Section 406(a)(2)(A) now provides that in a claim of entitlement to past-due benefits, if the written fee agreement is presented to the Commissioner before a final decision is rendered and the determination is favorable to the claimant, the Commissioner will approve the fee agreement if it does not exceed the lesser of 25% of the past-due benefits awarded or $4,000.00[2]. 42 U.S.C. § 406(a)(2)(A).

Section 406(a)(3) and the regulation promulgated pursuant to that section provide for a review of the determination of the attorney's fee award by an authorized employee of the SSA who did not make the original fee determination. 42 U.S.C. § 406(a)(3)(B)(i); 20 C.F.R. § 404.1720. Upon completion of the review, the attorney's fee fixed by the reviewer "shall be considered the amount of the maximum fee." *Id.* § 406(a)(3)(C). No further review of this decision is permitted. *Id.*; 20 C.F.R. § 404.1720(d)(1).

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2. This amount was increased to $5,300.00 effective February 1, 2002. 67 Fed. Reg. 247701, 2002 WL 58099 (Jan. 17, 2002).

Appendix C

III. STANDARD OF REVIEW.

> Attacks on subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) come in two forms: "facial attacks" and "factual attacks." Facial attacks on the complaint "requires the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." . . . "'Factual attacks', on the other hand, challenge 'the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.'"

Garcia v. Copenhaver, Bell & Assocs., M.D.s, 104 F.3d 1256, 1260-61 (11th Cir. 1997). A factual attack on jurisdiction that implicates the merits of the plaintiffs cause of action must be treated as a motion for summary judgment. *Id.* at 1261.

IV. ANALYSIS.

This dispute arises from the Commissioner's decision to award Culbertson less than 25% of the past due benefits awarded to Beers, Fuller-Gill, and Hollenbach. Culbertson asserts that the Court has jurisdiction under the mandamus statute, 28 U.S.C. § 1361, to compel the Commissioner to award fees in the amount agreed to by Culbertson's clients. He also seeks declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, and he references the Administrative Procedures Act ("APA"), 5 U.S.C. 704.

Appendix C

The Commissioner asserts that the Court does not have subject matter jurisdiction under any of these provisions. Because her arguments go directly to the merits of Culbertson's claims, I will treat the motion to dismiss as a motion for summary judgment.

1. *Mandamus.*

The Social Security Act provides that "[n]o findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided." 42 U.S.C. § 405(h). The Social Security Act does not provide for review of the Commissioner's attorney's fee decisions. 42 U.S.C. § 406(a)(3)(C). The question presented here is whether a petition for writ of mandamus is foreclosed by these statutory limitations on "review" of the Commissioner's decisions. The Mandamus Act gives the district court original jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owned to the plaintiff." 28 U.S.C. § 1361. It is an extraordinary remedy that should be used only in the clearest and most compelling of cases.'" *Cash v. Barnhart*, 327 F.3d 1252,1257 (11th Cir. 2003) (quoting *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969)).

Neither the United States Supreme Court nor the United States Court of Appeal for the Eleventh Circuit has decided whether mandamus is appropriate in matters involving the SSA. Some courts have found, however, that mandamus jurisdiction may exist, at least to the extent that it is necessary to require the Commissioner to abide by the laws and

regulations governing the SSA. *See Cordoba v. Massanari*, 256 F.3d 1044,1047 (10th Cir. 2001); *Buchanan v. Apfel*, 249 F.3d 485, 491 (6th Cir. 2001).

In order to invoke mandamus jurisdiction, Culbertson must show that he had a clear right to the relief requested, the SSA had a clear duty to act, and no other adequate remedy was available. *Cash*, 327 F.3d at 1258. I conclude that the statute and regulations governing awards of attorney's fees by the Commissioner for work solely at the administrative level do not entitle Culbertson to an award of the attorney's fees agreed to by his clients.

It is undisputed that Culbertson did not proceed under the expedited provisions of section 406(a)(2), which require an award of fees in the amounts set forth in that subsection. The fee agreements at issue do not comport with the language of section 406(a)(2)(ii), and there is no evidence that Culbertson submitted the fee agreements to the SSA before the Commissioner's determination of the merits of each claim.

Instead, Culbertson proceeded under section 406(a)(1), which places the discretion to determine the "reasonable fee" in the Commissioner. When the determination at issue is one left to the discretion of an agency, it is not properly the subject of a mandamus action. *See United States ex rel. Chicago Great Western R. Co. v. Interstate Commerce Comm'n*, 294 U.S. 50, 60 (1935). Therefore, the motion to dismiss for lack of subject matter jurisdiction under 28 U.S.C. § 1361 should be granted.

Appendix C

2. *The Declaratory Judgment Act and the APA.*

Neither the Declaratory Judgment Act nor the APA are independent sources of subject matter jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *Califano v. Sanders*, 430 U.S. 99, 105-07 (1977). Therefore, to the extent that Culbertson's claims are based on these statutes, the motion to dismiss for lack of subject matter jurisdiction should also be granted.

3. *Request for Leave to Amend the Complaint.*

Culbertson asks that he be given leave to amend the complaint to state a claim for mandamus relief requiring the Commissioner to abide by the statutes and regulations that govern her. The Commissioner opposes this request.

Because no responsive pleading has been filed, Federal Rule of Civil Procedure 15(a) gives Culbertson the right to amend his complaint once as a matter of course. *See Madden v. Cleland*, 105 F.R.D. 520, 526 (N.D. Ga. 1985) (motion to dismiss not a responsive pleading for purposes of Rule 15(a)). Therefore, I recommend that the Court give Culbertson leave to file an amended complaint within twenty days following the Court's ruling on this Report and Recommendation. I further recommend, however, that the Court caution counsel and Culbertson that an amended complaint must comply with Federal Rule of Civil 11.

Appendix C

V. RECOMMENDATION.

For the reasons stated above, I respectfully recommend that the Commissioner's Motion to Dismiss be **GRANTED**. I further recommend that the Court allow Culbertson to file an amended complaint within twenty days after its ruling, if this Report and Recommendation is adopted.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended at Orlando, Florida this day 7th of July, 2003.

s/ Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — FIRST AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED JULY 25, 2003

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NUMBER: 6:02-cv-1015-Orl-3IKRS

RICHARD A. CULBERTSON,

Plaintiff,

vs.

JO ANNE BARNHART, Commissioner of Social Security,

Defendant,

FIRST AMENDED COMPLAINT

Plaintiff, Richard A. Culbertson, by and through his undersigned counsel, files his complaint against the Defendant, Jo Anne Barnhart, Commissioner of Social Security, and states:

1. Plaintiff, Richard A. Culbertson, is a resident of Winter Park, Florida and a practicing attorney with his principal place of business in Orlando, Florida.

Appendix D

2. Defendant, Jo Anne Barnhart, is the Commissioner of Social Security responsible for the operation and administration of the Social Security Administration.

3. This Court has jurisdiction over this case under 28 U.S.C. Section 1361 to compel an officer of the United States to perform a duty owed to Plaintiff and under 28 U.S.C. Section 2201 to declare that Plaintiff has the right to certification by Defendant of payment to Plaintiff of an amount equal to 25 percent of past-due benefits due to his clients. This action is also authorized by 5 U.S.C. Section 704.

4. Plaintiff complains of decisions of the Commissioner which adversely affect Plaintiff, in that the Commissioner has made a series of unlawful decisions limiting Plaintiff's fees for administrative work before the Commissioner's agency.

5. Plaintiff is the attorney who represented the claimants listed below in successful claims for Social Security disability benefits before the Social Security administration and for which cases Plaintiff filed fee petitions seeking a fee under 42 U.S.C. 406(a)(4)(A).

6. Plaintiff was retained by Laura Fuller-Gill, Mary A. Hollenbach, and Brett E. Beers to represent them in their claims for benefits under the Social Security Act. The claim of each of these clients had been denied by Defendant at the time Plaintiff was retained.

7. Ms. Fuller-Gill, Ms. Hollenbach, and Mr. Beers each signed a fee agreement with Plaintiff agreeing that there would be no fee if their claims did not result in payment of past-due benefits, and that Plaintiff would be entitled to a fee up to 25 percent of any past due benefits if their claims were approved.

8. Each claim resulted in an award of past-due benefits.

9. In each claim, Plaintiff filed a Petition for Attorney fees requesting certification of payment of attorney fees in an amount equal to 25 percent of the past due benefits due each claimant. The amount requested in the case of Ms. Fuller-Gill was $5,650.75. The amount requested in the case of Ms. Hollenbach was $13,708.62. The amount requested in the case of Mr. Beers was $11,022.50.

ISSUE 1

10. In each claim, Defendant refused to certify payment of attorney fees in an amount equal to 25 percent of the past due benefits due each claimant as required by 42 U.S.C. 406(a)(4)(A). In Ms. Fuller-Gill's case, Defendant reduced the amount due by $2,650.75. In Ms. Hollenbach's case, Defendant reduced the amount due by $7,708.62. In Mr. Beer's case, Defendant reduced the amount due by $6,822.50.

11. 42 U.S.C. 406(a)(4)(A) provides ". . . if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Commissioner of Social Security **shall** . . .

certify for payment out of such past-due benefits . . . to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits. . . ." (Emphasis added).

12. In each case, Defendant certified for payment an amount less than 25 percent of the past-due benefits payable to each claimant.

ISSUE 2

13. 42 U.S.C. 406(a) provides in pertinent part "The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter . . ."

14. Defendant has not prescribed, by rule and regulation, the maximum fees which may be charged for services performed in connection with claims under the Social Security Act.

15. Defendant has established a system of reviewing each claim for attorney fees on a case by case basis.

16. The system of reviewing each individual claim for attorney fees is based on the application of arbitrary standards by Defendant who has a conflict of interest.

17. Plaintiff has the right to contract with his clients.

Appendix D

18. Defendant has the obligation under 42 U.S.C. Section 406(a)(4)(A) to certify payment of an attorney fee up to 25 percent of past due benefits subject only to any maximum fee established by rule and regulation.

19. Defendant has not prescribed, by rule and regulation, a maximum fee.

20. Since there is no maximum fee established by rule and regulation, the attorney fee that must be certified and paid by Defendant to Plaintiff, without discretion, is 25 percent of past-due benefits awarded to Plaintiff's clients.

ISSUE 3

21. When considering the Plaintiff's fee requests, the decision-makers failed to properly consider the factors required by the regulations found at 20 C.F.R. 404.1725.

22. When considering the Plaintiff's fee requests, the decision-makers failed to properly state what weight was given to the factors required by the regulations found at 20 C.F.R. 404.1725.

23. The decisions were unlawful because they denied Plaintiff due process guaranteed by the Fifth Amendment of the Constitution, and violated the requirements of 42 U.S.C. 406(a)(4)(A), 42 U.S.C. 406(a)(1), 20 C.F.R. 404.1720, 20 C.F.R. 404.1725, and the provisions of the agreed order entered into by the Defendant to settle the case of *Buchanan v. Apfel*, 69 F.Supp.2d 996 (E.D. Tenn. 1999).

Appendix D

24. The actions by the Commissioner are final actions of the Agency and are ripe for judicial review.

25. The Plaintiff has exhausted his administrative remedies.

WHEREFORE, Plaintiff prays:

(A) That the Court enter an order declaring that Plaintiff has the right to enter into contingency fee agreements with his clients providing for payment of an amount equal to 25 percent of the past-due benefits awarded;

(B) That the Court enter an order declaring that Defendant shall certify for payment to Petitioner out of his clients' past-due benefits an amount equal to 25 percent of such past-due benefits.

(C) That the Court issue a writ of mandamus, compelling Defendant to certify payment of attorney fees equal to 25 percent of past-due benefits awarded unless and until she promulgates, by rule and regulation, a maximum fee in a different amount;

(D) In the alternative, that the Court order the Commissioner to reevaluate the fees in each of the above cases; set reasonable attorney's fees in these cases in accordance with applicable laws and regulations; state the weight given to each of the factors found in 20 C.F.R. 404.1715; and comply with the provisions of the agreed order in *Buchanan v. Apfel*, 69 F.Supp.2d 996 (E.D. Term. 1999).

(E) That the Court award Plaintiff the cost of this action, reasonable attorneys' fees and such additional and further relief as the Court deems just and proper;

(F) That the Court retain jurisdiction of this case to assure compliance by Defendant.

DATED this 25 day of July, 2003

Respectfully submitted,

s/ Gus R. Benitez
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